No. 13,310

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GEORGE W. REED and INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION LOCAL NO. 36, A.F.L.,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR THE RESPONDENT, INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, A.F.L.

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On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR THE RESPONDENT, INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, A.F.L.

The Brief for Respondent Union herein is in answer to the petition for enforcement of an order by the National Labor Relations Board to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT.

I. Respondent Reed's interstate operations were so insubstantial as to have only a *de minimis* effect upon commerce, therefore the Board lacked jurisdiction to entertain the complaint under Section 10 (a) of the Act.

(a) In any event, the action of the Board is arbitrary, capricious and an abuse of its discretion when it applies its newly announced jurisdictional yardsticks to conduct occurring prior to the establishment of said jurisdictional policy.

II. The action of the Respondent Union did not encourage or discourage Union membership so as to violate the Act, in that the charging party was and continued to remain a Union member; such conduct did not violate Section 8(b) (2) and (1) (A) of the Act.

III. The Board's request for enforcement of an order to make whole the pay suffered by a temporary employee from the date of his alleged discharge to the offer of his reinstatement, is punitive rather than remedial in its nature, when said temporary employee's employment would have terminated in all events prior to said offer of reinstatement.

STATEMENT OF FACTS.

The charging party, Sydney Ernest Charlton, was a member of the Respondent Union continuously since 1906, a period of 42 years (R. 173). He had not re-

signed therefrom at the date of the hearing (R. 174) and was still a member thereof at said date (R. 182). He alleged he was discharged by Respondent Employer on June 19, 1949, because the Union insisted he have a clearance card before going to work (R. 6). The job from which the alleged discharge was effected was the Stonestown Development Project, a large residential apartment house development in San Francisco (R. 176-177). The charging party was only hired temporarily by the Respondent Employer (R. 160).

The interstate commerce facts pertaining to Respondent Employer, who was a local sub-contractor, instead of being developed upon the customary one year basis, were developed for a two and one-half year period, namely, 1948, 1949, and about six months of 1950 (R. 87-88).

During 1948, the following interstate commerce factors appear:

(a) No out of State sales made and no out of State services performed by Respondent Employer (R. 103);

(b) No out of State purchases made (R. 103);

(c) All materials purchased were manufactured from natural ingredients found in California (R. 101-102);

(d) Two jobs were done for public utilities, one for the Pacific Telephone & Telegraph at the contract price of $148,000.00 (R. 89-90); the

other for the Pacific Gas & Electric Company at the contract price of $63,000.00 (R. 91).

In 1949, Respondent Reed's interstate commerce factors were as follows:

(a) Respondent Reed did a gross business of $481,869.00 (R. 106); only $80,454.00 of this total represented the cost of materials (R. 99), leaving the balance of $401,415.00 attributable to labor costs, overhead and profits;

(b) No out of State sales were made and no out of State services were performed (R. 103-104);

(c) Only one out of State purchase made from Indiana, in the sum of about $1,900.00 (R. 100);

(d) All other material bought, was manufactured in California from the natural resources of this State (R. 101-102);

(e) The following large jobs were done at the contract price indicated;

(1) Pac. Tel. & Tel. Co. . . . . $150,000.00 (R. 95)

(2) Stonestown Department Project . . . . 100,000.00 (R. 96)

(3) Standard Oil Building 200,000.00 (R. 98)

(4) Macy's . . . . 57,000.00 (R. 97)

For the six months period of the year 1950, Respondent's operations indicated that:

(a) No materials were purchased out of State (R. 103);

(b) No contract was made for sales or services out of the State (R. 103);

(c) There were no jobs for public utilities or interstate commerce activities.

The chief materials used by the Respondent Reed during all the times mentioned, were, mortar, tile, terracotta, glazed tile (R. 87). There were no labor disputes with Respondent Reed for thirty years, outside of this one in question (R. 105).

The Trial Examiner provided that the charging party be made whole by payment to him of a sum of money equal to that which he would have normally earned from the date of his discharge to the date of the offer of his reinstatement (R. 40); the Board in its decision affirmed to all practical purposes that order (R. 58).

ARGUMENT.

POINT I.

RESPONDENT REED'S INTERSTATE OPERATIONS WERE SO INSUBSTANTIAL AS TO HAVE ONLY A DE MINIMIS EFFECT UPON COMMERCE, THEREFORE THE BOARD LACKED JURISDICTION TO ENTERTAIN THE COMPLAINT UNDER SECTION 10 (a) OF THE ACT.

It is most apparent from the recent decisions of our Supreme Court of the United States, that the power of Congress to legislate under the commerce clause has been broadened to the extent that the line of demarcation between intrastate and interstate commerce has become so thin as to be for all purposes

non-discernible. As aptly stated, Congress has plenary power to control commerce. However recognizing these premises, the Supreme Court has been careful to point out that there is some measure of limitation reserved by our Courts which would leave some remnant of jurisdiction to the State Governments, in which area the Federal Government might not legislate.

In *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937), 301 U.S. 1, 31, the Supreme Court stated:

> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. *Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce.* It purports to reach only what may be deemed to burden or obstruct that commerce, and thus qualified it must be construed as contemplating the exercise of control within constitutional bounds."

Later the Supreme Court had occasion to consider just what type of constitutional limitations remained and the application of the *"de minimis"* doctrine to the National Labor Relations Act was announced. The Supreme Court stated in the important decision of *National Labor Relations Board v. Fainblatt* (1939), 306 U.S. 601, 607, the following with respect to the *"de minimis"* doctrine:

> "Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the

> light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts *would apply the maxim de minimis*".

In a rather recent decision concerning the interstate commerce factor under the National Labor Relations Act, decided on November 4, 1949 by the U.S. Circuit Court of Appeals for the 10th Circuit, a case involving a local construction contractor who purchased $6000.00 worth of materials in one year outside of his State. The Court stated:

> "Considered in the light most favorable to appellant the impact of this labor dispute upon commerce, in any event, is as trifling and microscopic as to bring it within the above pronouncement by the Supreme Court (referring to *N.L.R.B. v. Fainblatt* (1939), 306 U.S. 601) and *requires the application of the de minimis doctrine.*"
>
> *Groneman v. International Brotherhood of Electrical Workers* (C.C.A.-10; 1949), 177 F. (2d) 995, 997.

In evaluating the weight to be given to the 10th U.S. Circuit Court of Appeals decision in *Groneman v. International Brotherhood of Electrical Workers,* supra, it is important to note that that Court considered three (3) cases on the interstate commerce question in the building industry since the 1947 amendments to the Act. Its attitude has not been one that might be typified as a liberal policy of

excluding cases from under the Act, but rather a strict approach of asserting jurisdiction wherever possible, as for example in its earlier decision of *United Brotherhood of Carpenters and Joiners v. Sperry* (C.C.A.-10; 1948), 170 F. (2d) 863, 867, the Court enunciated the principle that the commerce power under the Act extended to activities which in isolation might be deemed to be purely local.

It is fully appreciated that the application of this *de minimis* doctrine may be fraught with difficulty under a particular set of facts. However, in the instant case it appears inconceivable that such difficulty exists. The credible and material facts indicate that Respondent Reed in a period of 2½ years made no sales out of State, nor did he perform any contracts out of State. In a period of 2½ years he made no out of State purchases except a minor one for $1900.00 in the year 1949. All the materials he purchased in the 2½ years were manufactured locally from local raw materials. The greater portion of his contract price in all cases was the cost of his labor, with smaller amounts thereof representing his overhead and profits—as witness the fact that in 1949 his total gross business was $481,869.00, of which only $80,454.00 represented the cost of materials (R. 106).

In the six months period for the year 1950 that was considered by the Board, there is absolutely no interstate activity by the Respondent Employer in any single iota. No services were performed out of State and no sales were made out of State. No materials were purchased out of State. All materials used were

manufactured in California, from the natural resources of our State. Additionally no jobs were performed for public utilities or instrumentalities of commerce, nor were there prospective contracts for such agencies for the balance of that year.

Of all the cases deciding the interstate commerce issue under the Act since the 1947 Amendments, whether decided by our Federal Courts or by the Board, there appears to be none that have lower interstate commerce factors than the instant case.

Our Supreme Court has very recently passed upon the interstate commerce issue in three companion cases that arose out of the building construction industry. In all three cases jurisdiction was accepted under circumstances wherein at first blush it might appear that the interstate commerce factors were balanced with those of the instant case. However, a close analysis of each case readily distinguishes those cases from the instant one on the facts.

In the first of the three said cases, namely, *N.L.R.B. v. Denver Building & Construction Trades Council* (1951), 341 U.S. 675, the interstate commerce facts are much stronger than the instant one. In the *Denver Building Trades* case, supra, the Respondent Employer shipped $5000.00 worth of products out of the State annually; likewise he purchased $86,560.30 of raw material of which 65% or $55,745.25 were purchased out of State. In the instant case there were no out of State sales and only one interstate purchase of $1900.00 in the whole period of 2½ years.

In the second of these companion cases, the case of *I.B.E.W. Local 501 A.F.L. v. N.L.R.B.* (1951), 341 U.S. 694, the subcontractor on a construction job was performing $320.00 worth of work on a $15,200.00 private dwelling; the Court felt that the fact that the subcontractor and general contractor on the job were both out of State contractors and supplied materials on their jobs from out of State; that thereby such factors sufficiently affected commerce so that jurisdiction should be taken. In the instant case we have strictly a local San Francisco Bay area contractor, who at the maximum has traveled only to several jobs within this State and approximately 100 miles from San Francisco, at all times using for all purposes strictly intrastate materials.

In the third of these three companion cases, the case of *Local 74, United Brotherhood of Carpenters, A.F.L. v. N.L.R.B.* (1951), 341 U.S. 707, the Court held in effect that the application of the amended Act does not, *within limits of amounts too insignificant to merit consideration,* depend upon any particular volume of commerce affected. A labor dispute involving a store which engages in selling and installing wall and floor covering, sufficiently affects commerce to be within the scope of the Act, where, during a seven month period, the store purchased over $93,000.00 worth of goods, 33% of which were shipped to it from outside of the State, and an additional 30% of which were manufactured outside of the State; where the store did $100,000.00 worth of business of which 8% represented sales and installations

outside of the State, and where the store was an integral part of a system of 26 or 27 stores in seven different States.

It is readily apparent that the interstate activity of this last case far exceeds the instant case, when in the latter only $1900.00 of materials in 2½ years were purchased out of State.

The Board in developing evidence upon the interstate commerce issue introduced evidence of all the materials sent to all the jobs done by Respondent Reed, such as the materials purchased for the Stonestown project as well as the Standard Oil Building, and the Pacific Telephone & Telegraph Company buildings. It must be recalled that most of these jobs were completed at the time of the alleged unfair labor practice, and no dispute arose on any of these jobs at any time except at the Stonestown project out of which this case arose. It is respectfully submitted that the criteria of whether interstate commerce is affected or not, is the interstate commerce activity of the particular employer involved in the dispute, not the business operations of all others whom the instant employer may brush lightly or otherwise in his business dealings. The dispute at Stonestown involved only Respondent Reed as a sub-contractor there; the dispute did not involve the general contractor of the job or the latter's men.

The attempt to attribute to the Respondent Employer all the interstate operations of all others remotely connected with the case, not parties to the action, and who have no sufferance in any manner

with the dispute, exceeds the customary scope of interstate commerce operations chargeable to a single employer. As was stated by dissenting Judge C. J. Waller in *Shore v. Building & Construction Trades Council of Pittsburgh* (C.C.A.-3; 1949), 173 F. (2d) 678, 683:

> "The consideration by the Board of all the materials purchased, regardless of time or use by the contractor, the sub-contractor, and the merchants who sold to the contractor and sub-contractor during the year is comparable to the razor-back sow, which, in making her bed in the woods, indiscriminately rakes together all the available vegetables, leaves, sticks and straws, into a pile large enough to allow her to take refuge therein. * * * and if the interstate commerce of merchants who are wholly disconnected with the controversy can be accumulated to show substantiality, then not only every merchant employer, from Bill Grimes at the cross road near Yellow Rabbit to John Wanamaker of Philadelphia, whose sales are derived in part from commodities acquired from out of the State, but every employer who buys from such merchant any such materials to use in the construction of any store, whether it be that of Bill Grimes or that of John Wanamaker, would be under the jurisdiction of the Board. * * * It seems to me unnecessary to make excursions into the chimerical in order to give the Act the reasonable and practical enforcement that should be ascribed to the intent and purpose of Congress."

It is submitted that it is readily obvious that to obtain proof or to be able to adequately prepare a

defense to the evidence of interstate commerce activity of all persons remotely or otherwise connected with a case would be so overwhelming as to amount to a denial of justice to defending litigants.

The Board in the instant case assumed jurisdiction in accordance with the newly established jurisdictional standards just promulgated in its decision of *Hollow Tree Lumber Company* (Oct. 3, 1950), 91 N.L.R.B. 635, and as further released by the Board on October 6, 1950, to the press. The basis of the Board's asserting jurisdiction herein was that Respondent Reed furnished services or materials necessary to the operation of other employers engaged in commerce, such goods or services being valued at $50,000.00 per annum or more and being sold to public utilities, or to enterprises engaged in producing or handling goods destined for out of State shipment, or performing services outside the State in the value of $25,000.00 or more. As to the latter standard the record as a whole fails to disclose that any enterprise such as the Standard Oil Company, did or did not, about the time of this dispute perform services or make sales outside of the State of California in the value of $25,000.00 or more. Unless assumptions are to take the place of evidence, then in this one particular regard the Board on the face of the record as a whole has failed to prove its contentions.

Rationalizing upon another approach to the problem, the Act requires a showing that a labor dispute would *"affect"* commerce. It is most difficult to see how the mere proof of work having been or being

accomplished upon a new building constructed for a public utility would in itself affect commerce. A labor dispute on such unfinished building would not cut off one telephone or one electric light in the case of the Pacific Telephone Company or the Pacific Gas and Electric Company. At the time of the construction of a building all their activities were in operation unabated elsewhere in the city or area. Materials to be used at said building would not be interrupted in their inflow to the State, unless one assumes that the particular railroad or ship carrying such was required to end its journey at the building site. One cannot argue that the materials would not continue their transportation into the State. The most that can be said is that a labor dispute might to some slight degree affect some planned expansion of facilities for interstate use. A building erected for the sole purpose of providing more comfortable and finer appearing office quarters, or because of financial consideration to the public utility, such as for example, the saving of rental costs, certainly would not be one that contributed anything to commerce; any contrary reasoning in such case would be unrealistic and based upon mere conjecture, surmise and guess. Without proof in the record therefor of some of the aforesaid premises, surely the Board has failed in the instant case to definitely prove an effect upon interstate commerce. There is no presumption in fact or law that every building constructed for a public utility or a instrumentality necessarily contributes something or anything to commerce.

The performance of work and sale of materials in 1948 and 1949 (none in 1950) by Respondent Reed for the certain public utilities, therefore had such a negligible and insignificant effect upon commerce (if any effect at all) as not to be worthy of consideration. Upon the state of the present record, in the instant case, a finding by the Board, that commerce was sufficiently affected, was based wholly on conjecture, surmise and guess; upon which basis no decision can stand.

(a) In any event, the action of the Board is arbitrary, capricious and an abuse of its discretion when it applies its newly announced jurisdictional yardsticks to conduct occurring prior to the establishment of said jurisdictional policy.

The original dispute in this instant case allegedly occurred on June 14, 1949 (R. 176). The case was heard by the Trial Examiner on July 5, 6 and 7, 1950 (R. 16). The Trial Examiner made his decision in his intermediate report of January 29, 1951 (R. 46) wherein upon the basis of the Board's decision in the *Hollow Tree Lumber Company* (Oct. 3, 1950), 91 N.L.R.B. No. 635 and *Rock Asphalt Inc.* and *General Contracting Employer Association* (Nov. 6, 1950), 91 N.L.R.B. No. 228, the Trial Examiner and subsequently the Board (R. 56) accepted jurisdiction of the instant case upon their findings that Respondent Reed sold $50,000.00 worth of material or services to (1) public utilities, (2) to instrumentalities of commerce, and (3) to enterprises which produce or handle goods destined for out of State shipment, or perform services outside a State, where the goods or services are

valued at $25,000.00 a year. The Board on Friday, October 6, 1950, announced through the medium of a morning press release, the adoption of its new standards or jurisdictional yardsticks (R. 27).

The Respondent Union takes the position that this establishment of new standards was in effect a legislative act by the Board and that such standards were retroactively applied to the operation of the Respondent Employer, and therefore the Board's action was arbitrary, capricious and an abuse of its discretion. It must be recalled that the alleged conduct of the Respondents took place on June 14, 1949, and in the interim, while the Board's decision was pending in this instant case, the new jurisdictional standards were established, to wit, by decision on October 3, 1950, and further by the public newspaper release on October 6, 1950; this total action in effect was a legislative act by the Board. This appears to go beyond the making of a quasi judicial decision which might operate retroactively, but we have the additional announcement to the public through the press by the Board, that it has now established definite jurisdictional yardsticks with respect to the interstate commerce problem.

The Respondent Union is aware that decisions may be made that in their result may have a retroactive effect and yet not be objectionable, but the Board's new jurisdictional standards went beyond the making of a mere decision. The Board saw fit to announce *a new policy to the public* which it would henceforth

carry out in all cases. The retroactive application of such a new policy or plan would be inequitable.

Respondent Union cites just one decision on behalf of its position, the recent decision of our Ninth Circuit Court in *N.L.R.B. v. Guy F. Atkinson Co.* (C.A. 9; Feb. 29, 1952), 195 F. (2d) 141, 148. That case involved the Board applying a new jurisdictional policy retroactively to a building and construction industry case. The alleged conduct which resulted in the unfair labor practice involved, occurred at a time prior to the Board's new policy of accepting jurisdiction in the building and construction industry. Our Court stated therein as follows:

> "When it comes to adjudication of charges incorporated in a complaint designed to apply sanction because of alleged unfair labor practices, the question is whether the Board could *apply a policy rule which had not been published by it prior to the commission of the acts complained of* * * * We think it apparent that the practical operation of the Board's change of policy when incorporated in the order now before us, is to work hardships upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the Act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors."

The decision appeared to establish the rule that a reviewing Court may set aside an order of an administrative agency if the action of the agency is arbitrary, capricious or an abuse of discretion, provided that such agency action is not committed by law to the agency's discretion. The Court stated that the action of the Board in retroactively applying its policy to exercise jurisdiction in the building and construction industry to conduct resulting in a complaint, which conduct occurred prior to the establishment of the said policy (even though no prior proceeding had ever been brought against the Respondent) was arbitrary, capricious and an abuse of discretion and the Court would therefore not enforce the Board's order.

Respondent Union contends that if the instant case had been decided prior to the establishment of the Board's new jurisdictional yardsticks, under its prior policy and decisions, the Board would not have accepted jurisdiction in this matter.

A diligent search has been made of cases decided by the Board, arising out of the building and construction industry, involving like materials as the instant action. These cases were particularly decided after the Board accepted jurisdiction in the said industry, and prior to its newly announced standards; such cases fail to reveal to Respondents, any case with lower interstate commerce factors than the instant one.

A few of the Board's cases are illustrative of the above premises. In *Tampa Land & Material Co. Inc.*

(decided July 28, 1948), 78 N.L.R.B. No. 74, jurisdiction was refused by the Board wherein the facts indicated the manufacturers sold cement, tiles, concrete blocks, in the annual amount of $1,000,000.00 25% of which were for use in *commercial construction and improvements.* Sales included cement in building and construction in the local area, to *the U. S. Army, to interstate transportation lines and to nationally known interstate organizations.*

Likewise in *Texas Construction Material Co.* (decided Dec. 13, 1948), 80 N.L.R.B. No. 187, the Board refused jurisdiction over an employer who produced, sold and distributed sand and gravel for construction purposes, making sales annually to the value of $1,200,000.00 to customers who made redi-mix concrete *for all types of buildings, including highways and bridges.*

In *Knoxville Sangravl Material Co. Inc.* (decided Dec. 27, 1948), 80 N.L.R.B. No. 227, jurisdiction was refused over a producer of sand, gravel ready-mixed concrete, cement and lime, who sold annually $650,-000.00 of its products, of which *72% was used for all types of local building and construction, and about 6% was used for road building and the remainder sold to contractors, railroads and the Tennessee Valley Authority,* which used such for building and construction purposes.

The following is one of the late cases decided by the Board, just prior to the adoption of its jurisdictional standards (said standards being announced

Oct. 3, 1950, in *Hollow Tree Lumber Company,* 91 N.L.R.B., 635, 636, and by further press release on October 6, 1950): *Arthur B. Woods, et al. dba Valley Concrete Co.* (Feb. 7, 1950), 88 N.L.R.B. No. 116, where jurisdiction was not assumed over an employer processing sand, gravel and selling redi-mix concrete even though approximately 50% of its annual sales of $164,306.00 were *divided up in sales made for U.S. Highway maintenance and repairs, maintenance and repair of interstate railroad roadbeds, construction of State bridges and repair and maintenance of State and County roads,* and *sales of about $16,451.00 to four (4) lumber companies who sold in excess of $6,000,000.00 annually of their products* to out of State customers.

It is apparent that the foregoing cases involved instrumentalities of commerce, and no doubt much of the material sold in these cases went into buildings constructed for public utilities; additionally the above cases illustrate that substantial amounts of materials were sold to instrumentalities of commerce who performed services or sold goods valued in excess of $25,000.00 out of State.

Measuring the interstate commerce factors of the instant case with those of the Board's cases here cited, the interstate commerce factors of the instant case fall sharply below several of the said Board cases. The Respondents should have been able to rely on those decisions as indicating whether or not the Board had or would take jurisdiction over any labor dis-

pute in the Respondent Employer's business. To change the jurisdictional standards after the alleged conduct violative of the Act allegedly occurred and then to retroactively apply the new policy and standards to the instant case, is most unfair and inequitable. The action of the Board in so doing was arbitrary, capricious and an abuse of its discretion and the Board's order therefore should be denied enforcement.

POINT II.

THE ACTION OF THE RESPONDENT UNION DID NOT ENCOURAGE OR DISCOURAGE UNION MEMBERSHIP SO AS TO VIOLATE THE ACT, IN THAT THE CHARGING PARTY WAS AND CONTINUED TO REMAIN A UNION MEMBER; SAID CONDUCT DID NOT VIOLATE SECTION 8 (b) (2) and (1) (A) OF THE ACT.

The Board charges in its complaint that the Respondent Union caused the Respondent Employer to discriminate against the latter's employees, and in so doing caused said Employer to encourage membership within the Union in violation of Section 8 (b) (2) and (1) (A) of the Act (R. 6). The offense then bears on the question as to whether there was *such encouragement of Union membership.*

The Board in its brief strongly sets forth its position, that the requirement of a *clearance* to a job was the enforcement of closed shop conditions. It is submitted that there is not a scintilla of evidence considering the record as a whole to support the Board's contentions. From the conception of the term "closed shop" its definition simply, was that membership in

the Union was a condition precedent to the securing of a particular job or employment. The problem involved herein is not one of Union membership precedent to the securing of employment, but the dispute arose because of the alleged violation of an internal union rule applicable to its members. The charging party was a Union member, no question arose relative to his being a member before he obtained the job in dispute. Nothing in the record shows any attempt to enforce a clearance condition on any other non-union member seeking employment. An attempt was made to introduce a collective bargaining agreement that was not in effect at the time of the dispute and therefore could not be considered as illustrating any existing condition at the date of the dispute. The Board by their contentions in their brief to the Court, urging that under the facts of this case the Respondents were enforcing closed shop conditions, are in effect asking the Court to rule through the process of judicial interpretation that "white" shall be made to appear "black." Respondent Union contends that no question of "closed shop" exists in the record as a whole, nor can such an inference legally be drawn from the evidence.

As to the *encouragement* of the charging party's membership such an inference is wholly irreconcilable with the evidence as produced. The charging party had been a member of his Local for 42 years; he continued to remain a member after the dispute. He refused to get a "clearance" for the job even after the dispute arose, however, he made no effort to discon-

tinue his membership and it was continued by the Union. If anything, his displeasure with his being required to secure a clearance by the Union should have discouraged his membership. The Board however contends such a requirement encouraged his membership, arriving at their conclusion upon the basis that it was essential for the charging party to continue his membership in order to have continued employment. That premise would imply that the only purpose of Union membership is to secure employment. Respondent Union submits that reasoning is fallacious, in that the prime reason for members desiring to belong to a Union, is to obtain the best possible conditions of employment through effective collective action as opposed to ineffective individual action upon such things as wages, hours and multiple other conditions. That was the prime encouragement to the charging party's being a member of the Union for 42 years, and why he desired to continue his membership. The dispute did nothing whatever to encourage his membership. There is nothing in the evidence as given by the charging party or any other person, that the dispute arising out of the membership rule requiring a clearance to a job by a member, had the effect to encourage the charging party, or any other person's membership in the Union.

The Board in its brief cites *N.L.R.B. v. Walt Disney Productions* (C.C.A.-9; 1943), 146 F. (2d) 44, 49, a case decided by the Court herein to the effect that if encouragement can be reasonably inferred from the circumstances of the discharge, the finding of the

Board is binding upon the reviewing Court. Precisely that is what our Court did state, however, it must be recalled that that decision was made in the year 1943, prior to the Supreme Court's decision in *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U.S. 474, 490, wherein the Supreme Court announced the broadened power of our Appellate Courts in their review of any case from the Board. In that last decision the Supreme Court held that both the Administrative Procedure Act and the Taft-Hartley Act direct that Courts must now assume more responsibility for the reasonableness and fairness of N.L.R.B. decisions than they have in the past. Reviewing Courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Although N.L.R.B. findings are entitled to respect, they must nonetheless be set aside when the record before the Court clearly precludes the Board's decision from being gratified by a fair estimate of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Upon the above case of *Universal Camera Corp. v. N.L.R.B.,* supra, being remanded to the Second Circuit Court of Appeals in *N.L.R.B. v. Universal Camera Corp.* (C.A.-2; 1951), 190 F. (2d) 429, 430, the Second Circuit Court of Appeals held that under the Supreme Court decision considering the amended Act, the reviewing Court is not required to accept completely the determination of N.L.R.B. on issues of fact, at least where they are not made on the basis of the specialized knowledge of the Board. The Court must

determine which issues are not subject to such specialized knowledge. Upon those issues the judgment of the Court is of equal value to that of the Board.

Considering the above decisions relative to the reviewing power of our Court, it appears apparent that the Court herein is not bound by the Board finding that the alleged discriminatory action of the Respondent Employer encouraged either the charging party's membership or any other person's membership in the Union. Such a finding by the Board does not fall within any realm of specialized knowledge that the Board may have superior to that of the Court.

The Respondent Union will cite briefly the decisions herein upon which it relies to support its contention that unless the conduct complained of by the Board is shown by the evidence to *encourage* Union membership the Respondent Union is not guilty of an unfair labor practice.

There appears to be no need to burden this Honorable Court with lengthy argument on the point here contested, in that the decisions appear to be in a state of conflict amongst our various Circuit Courts, which conflict has evidently resulted in our United States Supreme Court granting certiorari in what appears to be two of the conflicting decisions on this point.

In *National Labor Relations Board v. Del. E. Webb Construction Co.* (C.A.-8; 1952), 196 F. (2d) 702, the facts indicated an apprentice belonged to a subsidiary Local of the same Union, which subsidiary Local was composed entirely of apprentices.

An apprentice could not become a member of the parent Local until he had completed his apprenticeship. The charging party, an apprentice, was discharged in accordance with a rule that gave journeymen preference in employment. The Court refused enforcement of the Board's order which charged the Union with violations of Section 8(b) (2) and (1) (A) of the Act; the same section claimed violated by the Respondent Union in the instant case. The Court held that the conduct of the Union and the employer did not *encourage* or *discourage* Union membership, in that the charging party's status was fixed so far as his Union affiliations were concerned, and could not be changed, at least, by any act of the Respondent Company. The apprentice could not be *encouraged* to be a member of the parent Union, because until his training was completed he never could become a member thereof.

In *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.* (C.A.-3; 1951), 187 F. (2d) 547, 551-552, our Third Circuit Court held that a wage raise to union member employees but which was not granted to non-union employees, could not *encourage* or *discourage* membership in the Union as it was a closed Union and the non-union employees were not eligible to join. Reversing the Board's decision the Court held that the non-union employees could not be *encouraged* to join the Union as it was impossible for them to do so.

The Eighth Circuit Court had occasion to consider this problem of *encouragement* or *discouragement* a

second time in *Del. E. Webb Construction Co. v. National Labor Relations Board* (C.A.-8; 1952), 196 F. (2d) 841, 848, wherein it held that an agreement establishing a Union "hiring hall" arrangement (the record as a whole didn't show that the hiring hall was for Union hiring only) did not violate the Act, as to the men involved, in that they were already members of the Union, and it was difficult for the Court to see how they could be *encouraged* to remain members of a Union in which they were having difficulty getting job placements.

The Seventh Circuit Court in *Western Cartridge Company v. N.L.R.B.* (C.C.A.-7; 1943), 139 F. (2d) 855, 859, held that the evidence failed to show that the action of the employer in firing certain employees, members of a group willing to be unionized, *discouraged* membership in a labor organization, where the said discharged employees went on a wild cat strike as individuals and not as members of the Union.

The Eighth Circuit Court in another decision, namely, *N.L.R.B. v. International Brotherhood of Teamsters, etc.* (C.A.-8; April 29, 1952), 196 F. (2d) 1, 4, held that, causing an employer to discriminate against an employee in regard to tenure or condition of employment is not an unfair labor practice unless the discrimination *encourages* or *discourages* membership in a labor organization. Reduction in seniority rating of employees because of his dues delinquency to the Union of which he is a member, constitutes discrimination. However, in the absence of any substantial evidence that such discrimination operated to *en-*

courage or *discourage* membership either on the part of the employee discriminated against or on the part of any other employee, a finding by the Board that the Union committed an unfair labor practice by causing the employer to take such action, is erroneous. The Court pointed out that the testimony of the employee involved shows clearly that this act neither *encouraged* or *discouraged* his adhesion to membership in the Respondent Union.

The Second Circuit Court came to the opposite result of the decisions hereinbefore cited in *Radio Officers Union v. N.L.R.B.* (C.A.-2; 1952), 196 F. (2d) 960, 965, where the Court held that the denial of employment to a union member for his failure to accept union principles and rules *encouraged* membership in the Union.

The last two cited cases are now before the Supreme Court for decision. The Supreme Court has granted certiorari in *N.L.R. B. v. International Brotherhood of Teamsters, etc.* (C.A.-8; 1952), 196 F. (2d) 1, Docket No. 301, on the Board's petition, and has also granted certiorari in *Radio Officers Union v. N.L.R.B.* (C.A.-2; 1952), 196 F. (2d) 960; Docket No. 230, upon the Union's petition for writ of certiorari.

It is submitted that in the instant case the action of the Union did not operate to *encourage* initial union membership, in view of the charging party's membership of 42 years, nor did it *encourage* him to remain a member of the Union. Nothing in the record as a whole, substantiates such *encouragement* of the

employee or any other employee. Any inference drawn from the record herein, can only be supported by sheer *suspicion* and *speculation.* In view of the record as a whole the Respondent Union is not guilty of a violation of Section 8(b) (2) and (1) (A) of the Act.

POINT III.

THE BOARD'S REQUEST FOR ENFORCEMENT OF AN ORDER TO MAKE WHOLE THE PAY SUFFERED BY A TEMPORARY EMPLOYEE FROM THE DATE OF HIS ALLEGED DISCHARGE TO THE OFFER OF HIS REINSTATEMENT IS PUNITIVE IN ITS NATURE, RATHER THAN REMEDIAL, WHEN SAID TEMPORARY EMPLOYEE'S EMPLOYMENT WOULD HAVE TERMINATED IN ALL EVENTS PRIOR TO SAID OFFER OF REINSTATEMENT.

Respondent Union is aware that the amount of back-pay due will become appropriate in a post-decree compliance proceeding. However the Board specifically asked for enforcement of its order which in its tenor determines the total period for which the Respondent shall be liable for back pay. The Trial Examiner's recommended order provided that the charging party be made whole by payment to him of money equal to that which he would *have normally earned from the date of his discharge* to the *date of the offer of his reinstatement* (R. 40); the Board in its decision affirmed to all practical purposes this order (R. 58).

The order is too broad and beyond the power of the Board to make. It appears to Respondent Union that if the order would have provided, in case of the Court's enforcement thereof, that the charging party

be made whole for any loss in back pay that he reasonably suffered by any alleged discrimination, then the Respondent at a post-decree compliance proceeding would not be faced with any possible argument that evidence of temporary employment or other pertinent factors bearing on the back pay based on a lesser time than that of the date of the offer of reinstatement should be precluded. Any other rule would abolish the principle of mitigation of damage.

Back pay can not include payment for time an employee would not have worked even had there been no alleged discrimination.

In *N.L.R.B. v. Cowell Portland Cement Company* (C.C.A.-9; 1945), 148 F. (2d) 237, the Court held that where a company intended to lay off an unsatisfactory worker, at the regular seasonal lay-off, the employee was entitled to back pay from the time of the discriminatory discharge to the time the Company usually commenced its seasonal layoff.

In the instant case the charging party was on loan for a temporary period of time from his former employer (R. 160) along with two other employees. If the evidence so establishes that fact, as Respondent Union contends it does, the liability for back pay would be affected by that fact and must be considered in any back pay determination.

That the Board has authority only to issue orders that are remedial rather than punitive in their nature, is well established (*Phelps Dodge Corp. v. N.L.R.B.* (1941), 313 U.S. 177, 199; *National Labor Relations*

Board v. Planters Mfg. Co. (C.C.A.-4; 1939), 106 F. (2d) 524). If the order for which enforcement is requested here by the Board was strictly enforced the result would be punitive in its nature.

In *Republic Steel Corp. v. Labor Board* (1940), 311 U.S. 7, 11, the Court held that the Board was authorized to issue any kind of an order so long as it operates essentially and primarily to effectuate the policies of the Act, and not *as a retribution or a penalty;* that any affirmative action is to achieve the *remedial* objects which the Act sets forth.

CONCLUSION.

In conclusion the Respondent Union respectfully submits, that respondent Reed's interstate operations had only a *de minimis* effect upon commerce and the Board therefore should not have asserted jurisdiction of the instant case. Further the Board's action in retroactively applying its new "jurisdictional yardsticks" plan or policy, in the instant case to conduct occurring prior to the establishment of the said plan or policy is arbitrary, capricious and an abuse of its discretion; enforcement of the Board's order, therefore, should be denied.

In any event the action of the Respondent Union under the facts herein, did not *encourage* or *discourage* the charging party's membership in the Union; the findings of the Board in that regard are invalid, as is any order of the Board requiring back pay from

the date of the alleged discharge to the date of an offer to said employee of reinstatement to his position, which order in its effect disregards the right to mitigation of damages, where such mitigation can be shown.

Dated, San Francisco, California,
November 24, 1952.

Respectfully submitted,
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